No. 92-94

IN THE
Supreme Court of the United States
October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the National Jewish Commission on Law and Public Affairs ("COLPA"), as *Amicus Curiae*, in Support of Petitioners

NATHAN LEWIN
(COUNSEL OF RECORD)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")
135 West 50th Street--6th Floor
New York, New York 10020
(212) 641-8952

Attorneys for *Amicus Curiae*,
National Jewish Commission on
Law and Public Affairs ("COLPA")

DICK BAILEY SERVICE (212) 608-7666 (718) 447-5359 (516) 222-2470 (914) 682-0848 Fax (718) 273-8031

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

A deaf child who is otherwise indisputably eligible for the in-school services of a publicly paid sign-language interpreter has been deprived of the means to understand his classes and communicate with teachers and students only because he attends a Catholic parochial school. A majority of a Ninth Circuit panel has held that James

Zobrest is constitutionally disqualified from the federal program that aids handicapped children because a government employee's presence on the premises of a sectarian school violates the "primary effect" component of the *Lemon v. Kurtzman* test. This callous result grows out of a misapplication of the Establishment Clause and violates rights guaranteed to minority faiths by the Free Exercise Clause of the First Amendment.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a non-profit association of volunteer lawyers and social scientists who donate their services for public advocacy on behalf of the Orthodox Jewish community. COLPA has filed briefs on the merits in most of the important religious liberty cases considered by this Court over the past twenty years. *See, e.g., Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mueller v. Allen*, 463 U.S. 388 (1983); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lee v. Weisman*, 112 S.Ct. 2649 (1992).

This brief is joined by national organizations of Orthodox Jewish rabbis and scholars, as well as synagogues and social service organizations which represent a broad spectrum of the Orthodox Jewish community in the United States. One of the joining groups is the Union of Orthodox Jewish Congregations of

America ("Orthodox Union"), a coordinating body for approximately 1,000 Jewish congregations in the United States. A major effort of the Orthodox Union is a program called "Our Way," established in 1969, which seeks to assist the Jewish deaf and hearing-impaired and to promote the accommodation of their special needs.

The other groups joining in this brief are:

Agudath Harabonim of the United States and Canada--The oldest Orthodox rabbinical organization in the United States, whose membership includes leading scholars and sages. It is intimately involved with educational, social and legal issues significant to the Jewish community.

Agudath Israel of America--A national Orthodox Jewish public interest organization with chapters in numerous Jewish communities throughout the United States and Canada. Through its Commission on Legislation and Civic Action and various other organizational divisions, Agudath Israel represents the full spectrum of Orthodox Jewish educational entities before federal, state and local government bodies.

National Council of Young Israel--A coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

The Rabbinical Alliance of America--An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been actively involved in a variety of religious, social and educational areas affecting Orthodox Jews.

The Rabbinical Council of America--The largest Orthodox Jewish rabbinical organization in the world with a membership in excess of 1,000. It is deeply involved in issues related to religious freedom.

Torah Umesorah--The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States. As an integral part of the non-public school community, Torah Umesorah regularly relates to government agencies and officials on educational issues affecting that community and has a continuing concern for the delivery of services to non-public school students.

We are supporting the petitioners in this case because we believe that the Ninth Circuit's use of the Establishment Clause to strike down religiously neutral benefits to religious school children who would otherwise qualify under child-welfare programs authorized by federal law for *all* students is a serious blow at religious liberty and is wholly unjustified by the language, policies, and sound judicial application of the First Amendment.

We direct this brief to three subjects that govern the proper outcome of this case:

First, we discuss the *form* of the state aid provided to the petitioners and note that it is, in no sense, governmental encouragement of or involvement in religion. A sign-language interpreter provides an individualized remedial service that is wholly secular and functional. He or she merely facilitates communication by others with a disabled person.

Second, we consider the *location* of the assistance provided by such an interpreter. In companion cases decided by close divisions in 1985 the Court held that even wholly secular instruction given by public school personnel may violate the Establishment Clause if the instruction is given in "identifiably religious schools." A five-member majority of the Court concluded that remedial education classes may not be taught by public school personnel in

sectarian school buildings because such instruction presents a "substantial risk of state-sponsored indoctrination" and because monitoring of such a program to prevent the feared indoctrination amounts to constitutionally forbidden "entanglement" of church and state.

The two 1985 rulings were challenged when rendered by three Justices who are presently on the Court (along with then Chief Justice Burger). The two decisions were unsound when issued, and they have had devastating consequences for thousands of disabled and needy children who most require government help to enable them to reach their potential and live full and productive lives as American citizens. The decisions have also produced huge wasteful expenditures of public funds. We urge the Court to prevent further tragedy and waste by formally repudiating the highly mischievous decisions in *Grand Rapids School District v. Ball,* 473 U.S. 373 (1985), and *Aguilar v. Felton,* 473 U.S. 402 (1985).

Third, we review the necessary impact of the ruling below on the exercise of religious beliefs by parents of school children who are in the position of the petitioners. By denying a sign-language interpreter to a deaf child *only because he attends a sectarian school,* government authorities erect a significant obstacle to the child's attendance at religious school and discourage the exercise of religious beliefs by him and his parents. The Free Exercise Clause of the First Amendment has absorbed a recent body blow from this Court, but that Clause continues to protect religious adherents against the selective discrimination that results from the rulings of the court below.

ARGUMENT

I

PROVIDING A SIGN-LANGUAGE INTERPRETER IS A MEANS OF AIDING A CHILD WITH A PERSONAL HEALTH IMPAIRMENT AND IS, THEREFORE, EQUIVALENT TO CHILD-WELFARE MEDICAL ASSISTANCE THAT PRESENTS NO ISSUE UNDER THE ESTABLISHMENT CLAUSE

This case concerns a form of assistance to individual students that is singularly unrelated to the harms that the Establishment Clause is designed to reach. Enabling a deaf high school student to communicate with those around him is entirely consistent with the rule that government should not, in any manner, "aid one religion, aid all religions, or prefer one religion over another" (*Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947)) and with the principle that the Constitution forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity" (*Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973)). A sign-language interpreter is not a religious proselytizer, and, even in the "environment" of a religious school, he or she does not engage in "state-sponsored indoctrination."

The job of a sign-language interpreter is to translate sounds into visually perceived hand gestures. The message communicated to the deaf person by the interpreter is the message expressed by a speaker. The interpreter's role is the same as that of a hearing aid used by a child who has a relatively minor hearing impairment and the same as a pair

of eyeglasses used by someone who has faulty vision.

Disabled children may rely on various devices that assist them to function more easily in a school setting. Paraplegics may need wheelchairs to go from class to class. Blind or nearly-blind students may need canes or dogs to enable them to move about or high-powered ocular lenses to capture a visual image of a student. Other children may use artificial limbs to hold books or writing implements. All these devices are intrinsically personal to their users and are religiously neutral. They enable an individual handicapped student to function in his or her school setting. A sign-language interpreter is a human analogue of any of these devices.

The fact that a handicapped child is attending a religious school and goes from his class to a religious chapel does not turn the wheelchair he uses into a sacred carriage. Nor does the cane held by a blind student to facilitate entry into a Bible class become a holy staff because it makes religious instruction possible. No rational person views a hearing aid as a sacred object if its user relies on it to hear prayers and sermons. By the same token, a sign-language interpreter is not transformed into a religious functionary merely because a portion of his day is spent interpreting religious instruction in a parochial school.

The logic of the Ninth Circuit's ruling would require the invalidation of public bus transportation for parochial-school students who are, after all, brought to the school chapel in which they pray each morning, as well as to their history classroom, by the school bus. It would require courts to declare parochial school students ineligible for school lunch or milk programs because the children who eat lunch or drink milk are thereby nourished not only while studying reading and arithmetic, but also while

learning the Bible and reciting prayers.

The appropriate line heretofore drawn between constitutionally permissible aid to children and constitutionally forbidden aid to religion turns on whether the benefit provided by government significantly helps the child individually and personally in areas other than religious indoctrination. A child who travels on a publicly financed school bus is relieved of the stresses and dangers of private travel from home to school. That is a personal secular benefit, having no intrinsic religious component. The same is true of a child who is nourished on school premises.

Services or devices that aid a child who is physically disabled fall into the same category. Eyeglasses, hearing aids, wheelchairs, and artificial limbs are personal secular benefits. They help a handicapped child deal with many situations he or she encounters in school and elsewhere. Religious education and training are among a child's experiences, and services and devices that help a child function with disabilities necessarily assist the child in prayer, Bible study, and other religious observance. But this assistance is merely part of a more comprehensive effort to enable the handicapped child to adapt to the world around him.

A sign language interpreter who accompanies a deaf child to religious classes as well as to arithmetic and geography lessons is, by the same token, serving the child personally, not advancing the religious denomination that operates the school. The interpreter permits the child to communicate with teachers and classmates *on all subjects,* religion being only part of the child's total life.

Consequently, government funding of the interpreter during school hours, no matter what school the child attends, is a benefit to the child, not a means to aid or

advance religion. It is remote from the evils at which the Establishment Clause is directed and is wholly beyond that constitutional prohibition.

II.

THIS COURT SHOULD OVERRULE PRECEDENTS THAT INVALIDATE OTHERWISE PERMISSIBLE GOVERNMENT PROGRAMS ONLY BECAUSE THEY ARE LOCATED ON THE PREMISES OF RELIGIOUS SCHOOLS

We turn now to the question of *location.* A majority of the Ninth Circuit panel was persuaded to reach its finding of unconstitutionality by the fact that the interpreter's services were being provided "at a sectarian school." The court's opinion noted twice that the effect of public funding of James Zobrest's interpreter was "placing [a government] employee in a sectarian school" (Pet. App. A-10; *see also* Pet. App. A-11 ("the government would be required to place its own employee in the sectarian school")).

The Ninth Circuit relied on this Court's decision in *Grand Rapids School District v. Ball,* 473 U.S. 373 (1985), in arriving at this result (Pet. App. A-9, A-10). The *Grand Rapids* case, together with its companion, *Aguilar v. Felton,* 473 U.S. 402 (1985), did indeed invalidate remedial secular programs, conducted by public school personnel under the supervision of secular public school authorities, merely because they were located on the premises of religious schools. A bare majority of the Court concluded that there was a *risk* that teachers on the premises of a sectarian school "may well subtly (or overtly) conform their instruction to the environment in which they teach,

while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect." 473 U.S. at 388.

There was no factual evidence in either the *Grand Rapids* or *Aguilar* records to support the existence of such a "risk." Nonetheless, on the basis of this speculation, a majority of the Court struck down a program that had, in the previous year, provided greatly needed assistance to 184,532 educationally deprived children attending private schools. *See* U.S. Department of Education, *A Summary of State Chapter 1 Participation and Achievement Information*, p. 5 (1992); *The New York Times*, June 18, 1986, p. 15, col. 1; Lines, *The Entanglement Prong of the Establishment Clause and the Needy Child in the Private School: Is Distributive Justice Possible?*, 17 Journal of Law & Education 1, 28 (1988).

Strong dissenting views were expressed by four Justices. In the conclusion to her cogent dissent, Justice O'Connor said (473 U.S. at 431):

> For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis in *Meek v. Pittenger* on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause.

Statistics maintained by the United States Office of Education show that in the year following *Grand Rapids* and *Aguilar* there was a significant drop of 31 percent in the number of disadvantaged students in private schools served by Title I programs under the Elementary and Secondary Education Act of 1965. In the Jewish religious schools, approximately 60 percent of the students serviced before *Grand Rapids* and *Aguilar* were not provided Title I services in the following year. See testimony of David Zweibel, General Counsel and Director of Government Affairs of Agudath Israel of America, before the Subcommittee on Elementary, Secondary and Vocational Education of the House Education and Labor Committee, March 30, 1987.

In succeeding years, as religious schools turned to off-premises instruction in mobile vans, the numbers increased slightly. But the Office of Education statistics show that whereas 184,532 private school students benefited from Title I assistance in 1984-85, before the *Grand Rapids* and *Aguilar* rulings, the figures for later years were much lower (U.S. Department of Education, *A Summary of State Chapter 1 Participation and Achievement Information*, p. 5 (1992)):

Year	Public School Students Participating in Title I Programs	Nonpublic School Students Participating in Title I Programs
1984-85	4,528,177	184,532
1985-86	4,611,948	127,922
1986-87	4,595,761	137,900
1987-88	4,808,030	136,618
1988-89	4,777,643	137,656
1989-90	5,014,634	151,948

This chart demonstrates that in each of the five years that followed this Court's 1985 rulings, *Grand Rapids* and *Aguilar* deprived between 32,000 and 56,000 needy nonpublic-school students of assistane they would otherwise have received under Title I.

A contemporary analysis of the effects of the *Aguilar* decision observed that "the Court has left few effective means for public authorities to supplement the education of children, rich or poor, whose parents send them to religious schools." Supreme Court Note, 99 Harv. L. Rev. 120, 182 (1985). And the district court opinion in *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248, 1255-56 (S.D.N.Y. 1980), had described the unsuccessful efforts that had previously been made to conduct remedial secular programs after school hours and on premises other than at the schools regularly attended by the students. There can be little doubt, therefore, that the practical effect of these two decisions has been enormously damaging.

Since the decision in *Aguilar v. Felton*, educators seeking to restore to disadvantaged students the assistance Congress wanted them to receive under Title I have been compelled tortuously to arrange remedial instruction in mobile vans parked on public property. The result has been use of public funds for the purchase and installation of the vans and much litigation over the constitutionality of this method of providing needed education to otherwise qualified children off the premises of parochial schools. *See, e.g., Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991).

The battle continues and will continue so long as *Grand Rapids* and *Aguilar* express legal standards that educators and courts must apply. The effect of these decisions has been to deprive many growing children of

remedial education for the past seven years and to dissipate resources in court contests and in the purchase of trailers and other temporary structures whose only purpose is to avoid the arbitrary and artificial reach of these rulings.

A graphic description of the likely consequences of *Grand Rapids* and *Aguilar* was given to a House of Representatives subcommittee in March 1987, and the siutation then described has continued to this day:

> These, then are the problems created by *Felton*: decreased participation by nonpublic school students in the Chapter 1 program; academically and socially unsatisfactory off-premises alternate service delivery mechanisms for students who do participate; staggering administrative expenses necessary to implement such off-premises services; and heightened inter-community strife and tension.

Testimony of David Zweibel, General Counsel and Director of Government Affairs of Agudath Israel of America before the Subcommittee on Elementary, Secondary and Vocational Education of the House Education and Labor Committee, March 30, 1987.

The proposition that any publicly financed instruction that takes place on the premises of a religious school is irreversibly tainted by the environment of the school is, as Justice O'Connor noted in her dissent, an "untenable theory." Its effect is, as former Chief Justice Burger observed, to deny "desperately needed remedial teaching services" to schoolchildren - an enormous "human cost." 473 U.S. at 419. Chief Justice Rehnquist the risk that the Court majority in *Aguilar* found unacceptable as "gossamer

abstractions" and he, too, decried the effect of *Aguilar* as barring "sorely needed assistance" to "educationally deprived children from low-income families." 473 U.S. at 421.

This case tests the logic of *Grand Rapids* and *Aguilar*. Is a governmentally paid interpreter constitutionally tainted because he does his sign language interpreting on the premises of a sectarian school? *Grand Rapids* and *Aguilar* may suggest that he is. We submit that good sense and a sound application of the policies of the Religion Clauses to these facts prove the fundamental error of *Grand Rapids* and *Aguilar*. They should be explicitly overruled so that they will cease to do harm to the schoolchildren and the general welfare of this nation.

III.

THE FREE EXERCISE CLAUSE PROHIBITS DEPRIVING A PAROCHIAL SCHOOL STUDENT OF FEDERAL ASSISTANCE FOR HIS PHYSICAL HANDICAP MERELY BECAUSE HE ATTENDS A RELIGIOUS SCHOOL

There is an aspect of this case that is particularly troblesome to this *amicus*, which represents the Orthodox Jewish community - a large group of Americans whose religious beliefs require them to provide an intensive Jewish education to their children. Religious schools are not a luxury for members of our community; they are central obligations of our faith. Accordingly, we are extremely sensitive to any discrimination in public benefits against children solely and exclusively because they attend religious schools.

James Zobrest is unquestionably the victim of such

discrimination. Apart from the religious character of his school, he is fully qualified for the assistance of a sign-language interpreter under the provisions of the Education of the Handicapped Act, 20 U.S. C. §§ 1401 *et seq*. He has been deprived of that assistance solely because he is enrolled in a Catholic parochial school - a constitutionally protected liberty that he and his parents may exercise.

Employment Division v. Smith, 494 U.S. 872 (1990) - which severely impaired the protection afforded religious minorities by the Constitution - does not entitle government to discriminate *against* religious observers. Indeed, the Court's opinion preserves the Free Exercise Clause insofar as it shields religious minorities against selective governmental action. *See* 494 U.S. at 882, 884. In this case, the Free Exercise Clause entitles James Zobrest to claim the same federal benefits to overcome his deafness as are made available to children who attend nonreligious private schools. Since the only basis for denying him an interpreter is his attendance at a *religious* school, that denial must be set aside under the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed with instructions to enter judgment for the plaitniffs.

Respectfully submitted,

NATHAN LEWIN
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M. Street, N.W.
Washington, D.C. 20037
(202) 293-6400

DENNIS RAPPS
NATIONAL JEWISH
COMMISSION ON LAW AND
PUBLIC AFFAIRS ("COLPA")
135 West 50th Street-6th Floor
New York, New York 10020
(212) 641-8992

Attorneys for *Amicus Curiae*,
National Jewish Commission on
Law and Public Affairs ("COLPA")

November 1992